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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-490

McDONNELL DOUGLAS CORPORATION,
Petitioner,

v.

PERCY GREEN,
Respondent.

BRIEF

In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

QUESTION PRESENTED

Did the Court of Appeals improperly interpret antidiscrimination provisions of Title VII, 1964 Civil Rights Act, when it instructed the trial court that an employer's evidence of objective, job-related reasons for refusing to hire an applicant will carry more weight in rebutting a prima facie showing of bias, then will an employer's evidence of subjective reasons that fail to relate the applicant's qualifications to legitimate, non-discriminatory job requirements and business necessity?

STATUTES INVOLVED

This case involves the construction and interpretation of the 1964 Civil Rights Act, 42 U.S.C. Section 2000e et seq., and particularly Section 2000e-5(g), which provides as follows:

> "If the court finds that the [employer] has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the [employer] from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title."

STATEMENT OF THE CASE

This suit was instituted in the district court by respondent Green under Title VII of the 1964 Civil Rights Act ("The Act"), 42 U.S.C. Section 2000e et seq., which was designed to provide equal employment opportunities. Respondent, a black man, contended that petitioner McDonnell violated the Act because it refused to hire him when he applied for a job as a mechanic in July, 1965. Respondent was admitted by petitioner to be qualified for the position available. He had a high school education, had taken eleven (11) courses offered by petitioner, and, with the exception of 21 months in the Army (during which he also took courses), had been employed by petitioner from 1956 until his lay-off in 1964. He had a "secret" security clearance, his job ratings were good, and one supervisor testified that he was even qualified to be a Class A Laboratory Technician.

Green was a member of CORE, a civil rights group organized to achieve the objectives, inter alia, of Title VII. In October, 1964—prior to the formation of ACTION, of which respondent was later chairman (note petitioner's error on this point)—Green participated in a CORE-sponsored demonstration designed to call public attention to McDonnell's discriminatory employment practices, during which Green and others attempted to stall their cars on an access route to petitioner's plant. Only a few hundred commuters were effected for about ten minutes, and Green was arrested for obstructing traffic. The "stall-in" was located from one-fourth mile to two miles from petitioner's plant, according to various witnesses. Green pleaded guilty to the misdemeanor charge, and paid his fine of $50.00.

On July 2, 1965, a participant in an ACTION-sponsored protest demonstration outside one of McDonnell's buildings chained and padlocked the building's main door. By

the time Green arrived on the scene, the chains were being removed.

Three weeks later, McDonnell ran advertisements in the St. Louis, Missouri, newspapers seeking qualified electrical mechanics. Green applied for one of these positions, but McDonnell, though still seeking qualified mechanics, refused to hire him.

On March 30, 1972, a three-judge panel of the Eighth Circuit, one judge dissenting, reversed the district court and remanded for a new trial. Petitioner filed a timely Petition for Rehearing En Banc, which resulted in a modification by the panel of Point V of the majority opinion and which also produced a supplemental dissent by Judge Johnsen. In view of the modification, McDonnell's Petition for Rehearing was overruled without prejudice to the filing of another request for rehearing on the modified opinion. McDonnell's renewed Petition for Rehearing En Banc was denied by an evenly divided vote of the Court En Banc on June 28, 1972.

The modified opinion of the Court of Appeals held, first, that the district court had erred in imputing to Green any illegal conduct pertaining to the "lock-in" incident; second, that the district court had erred in striking Green's allegation of racial discrimination on the ground that the EEOC had not made a reasonable cause finding concerning such discrimination; and the appellate court thereafter discussed the legal issues raised by this suit with considerably more craftsmanship than petitioner gives it credit for. Respondent respectfully refers this Court to that opinion, 463 F.2d 337.

It is to be noted that the Court of Appeals was unanimous in its finding that the district court had erred in construing the Act to preclude Green's allegation of racial prejudice. This basis for remand is not challenged here by petitioner.

REASONS WHY THE WRIT SHOULD BE DENIED

The question presented is whether the Court of Appeals improperly interpreted anti-discrimination provisions of Title VII, 1964 Civil Rights Act, when it instructed the trial court that an employer's evidence of objective, job-related reasons for refusing to hire an applicant will carry more weight in rebutting a prima facie showing of bias, than will an employer's evidence of subjective reasons that fail to relate the applicant's qualifications to legitimate, non-discriminatory job requirements and business necessity.

As noted, the Court of Appeals unanimously held that the trial court erred by striking respondent's allegation of racial bias. That holding, unchallenged here by petitioner, required remand. Since remand was required, the appellate court addressed itself to three closely related points upon which it felt guidance for the trial court was appropriate. Those points comprise the only question before this court and represent well-established doctrine.

First, when a black job applicant, alleging that his prospective employer refused to hire him due to racial bias, proves that he possessed the requisite skills for the unfilled position applied for, the applicant may rest his case, for he has made a prima facie showing in support of that allegation. **Green**, 463 F.2d at 352.

Second, once a prima facie showing of racial discrimination has thus been made, the burden shifts to the employer to prove the Constitutional and statutory bona fides of its refusal to hire.

Third, since "employers seldom admit racial discrimination", **Green**, loc. cit., citing **Marquez v. Omaha, Ford Division**, 440 F.2d 1157, 1162 (8th Cir. 1971), an em-

ployer's mere **denial** of such discrimination will carry little probative value on the question of whether such discrimination existed. Something of greater probative value, the appellate court instructed, is necessary. This cautionary note, far from announcing "novel evidentiary principles" (as petitioner claims, p. 8), is grounded in a realistic appraisal of what would happen to Title VII if its strictures could be thwarted by an employer's mere protestations of rectitude.

In carrying its burden of rebutting the inference that race was a motivating factor in its refusal to hire, the employer must provide the trial court with an "extenuating explanation." **Rowe v. General Motors Corporation**, 457 F.2d 348, 357 (5th Cir. 1972). That explanation must prove "non-discriminatory legitimate business necessity" (l.c. at 354), and carries greatest probative value when not "cloaked in generalities and vague criteria which do not measure an applicant's qualifications in terms of job requirements." **Green**, 463 F.2d at 352. As stated by this Court: "If an employment practice which operates to exclude Negroes cannot **be shown** to be related to job performance, the practice is prohibited." **Griggs v. Duke Power Co.**, 401 U.S. 424, 431 (1971). (Emphasis added)

The Eighth Circuit did no more than require McDonnell to show that its refusal to hire a qualified black while keeping the position open was justified by valid, objective, non-discriminatory business reasons. It did not hold that McDonnell could not justify its refusal to hire Green based on subjective evidence; it merely held that such reasons must bear a manifest relationship to the job and that objective factors are to be given greater weight than subjective factors. This holding is in accord with **Rowe**, supra; **Moore v. Board of Ed. of Chidester Sch. Dist. No. 59, Ark.**, 448 F.2d 709 (8th Cir. 1971); **Brown v. Gaston County Dyeing Machine Company**, 457 F.2d 1377

(4th Cir. 1971), and **Griggs**, supra. The crux of these decisions is that Title VII reaches "not only overt discrimination," **Griggs**, supra, 401 U.S. at 431, but also covert discrimination. If Title VII is to become anything more than an "illusory commitment" to equal employment opportunities, (**Green**, 463 F. 2d at 352) then courts will have to accord greater evidentiary weight to objective criteria than to subjective criteria. That was the crux of the appellate court's instructions here.

To put those instructions into perspective, it should be noted that McDonnell was permitted by the trial court to rest its case upon the assertion that Green had engaged in "unprotected" activity in his protests against its allegedly discriminatory employment practices. The appellate court reversed the trial court's finding that such activity, occurring during the July 2, 1965, "lock-in" demonstration, was imputable to Green, and this reversal is not here challenged by petitioner. The appellate court agreed with the trial court, however, that Green's participation in the "stall-in" (for which he was charged with a misdemeanor, plead guilty, and paid a nominal $50.00 fine) was "unprotected"—although neither court found "relevant authority" (**Green**, 463 F.2d at 341) for so holding, and neither indicated whether that holding gave consideration to the unique tempo of those times (Autumn, 1964), when frequently the streets provided the only platform from which civil rights advocates could obtain attention. Be this as it may, the appellate court went on to observe that McDonnell might have refused employment to Green for reasons other than his participation in the "stall-in"—an observation no doubt prompted by Green's erroneously-stricken allegation to that effect. To quote the opinion below: "Green should be given the opportunity to show that these reasons offered by the Company were **pretextual**, or otherwise to show the pres-

ence of racially discriminatory hiring practices by McDonnell which effected its decision." 463 F.2d at 353. (Emphasis added.)

The opinion below is sound, and the instructions from the appellate court are appropriate, flow directly from this Court's opinion in **Griggs**, supra, and should not be disturbed. Petitioner's somewhat hysterical treatment of the opinion below seriously misstates that holding and then engages in rather foolish extrapolations based on that misstatement. Stripped of its emotion and hyperbole, however, that Petition provides no substantial basis for granting the Writ.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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